84-1676

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 84

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FLOYD H. PLUECKHAHN,

Petitioner

v.

FARMERS INSURANCE EXCHANGE,
FARMERS NEW WORLD LIFE INSURANCE CO.,
TRUCK INSURANCE EXCHANGE,
MID-CENTURY INSURANCE CO.,
FARMERS GROUP, INC.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether it is proper under section 1, Sherman Act, to analyze a restraint of the marketing of services ancillary to a larger business activity out of which the ancillary market arises, in terms of the larger business activity, rather than the ancillary market itself, when both are a part of interstate commerce.

2. Whether public injury is an essential element of a cause of action under section 1 of the Sherman Act.

3. Whether entities, who comprise a common enterprise, are not in competition with each other, and whose actions affect no one outside the common enterprise, are immune from section 1 of the Sherman Act.

4. Whether naked contentions of prevention of the appearance of impropriety and actual impropriety are sufficient justification under the "rule of reason" to permit an employment restraint which prohibits an employee of those imposing the restraint from being able to market his services for more and better compensation.

5. Whether it is necessary for the target of a boycott to be in competition with the boycotters in order for a per se analysis of the boycott to be appropriate.

6. Whether a unity of business purpose between those conspiring to boycott forecloses per se analysis of the boycott.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

Questions Presented 1
List of Parties 2
Table of Contents 2
Table of Authorities 3
Opinions Below 4
Statement of Jurisdiction 4
Statutes Involved 4
Statement of the Case 5
Argument for Allowance of Writ 6
Conclusion 14
Appendix
Opinion of the Fifth Circuit 1A
Judgment of the Fifth Circuit 13A
Fifth Circuit Denial of Rehearing 15A
Judgment of District Court 17A
District Court Findings of Fact 18A
District Court Conclusions of Law 26A
Record, Vol. 6., pp. 351, 342 ....29A-31A
15 U.S.C. §1 ..... 32A

TABLE OF AUTHORITIES

Cases

Anderson v. *Shipowners Association,* 272 U.S. 359 (1926) 6
Klor's v. *Broadway-Hale Stores,* 359 U.S. 207 (1959) 14
National Society of Professional Engineers v. *United States,* 435 U.S. 679 (1978) 9
Radiant Burners v. *Peoples Gas L. & Coke Co.,* 346 U.S. 656 (1961) 8
Radovich v. *National Football League,* 352 U.S. 445 (1957) 6
Re McConnell, 370 U.S. 230 (1962) 8
St. Paul Fire & Marine Ins. Co. v. *Barry,* 438 U.S. 531 (1978) 9,12
U.S. v. *Int'l Boxing Club,* 348 U.S. 236 (1955) ... 13

Statutes:

15 U.S.C. §1 4,6
15 U.S.C. §15 4,6,8
15 U.S.C. §22 6
15 U.S.C. §1013 6
28 U.S.C. §1254 4
28 U.S.C. §1332(1) 6
28 U.S.C. §1337 6

OPINIONS BELOW

The district court did not write an opinion. The opinion of the Court of Appeals for the Fifth Circuit is reported at 749 F.2d 241. The opinion is reproduced in the appendix.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on 2 January 1985 (App. 13A). Motion for rehearing was timely filed and was overruled on 30 January 1985 (App. 15A). This Court has jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

15 U.S.C. §15

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §1

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

(The full text of §1 is set out in the appendix.)

STATEMENT OF THE CASE

The statement of the case made by the Court of Appeals in the section of the opinion entitled "Background" is substantially correct except in two particulars to be mentioned below.

Concisely put, the case is this: Petitioner, Plueckhahn, held an in-house management position as an employee of Farmers Group, Inc., the managing arm for all the Respondents, who are engaged in the interstate sa'e and distribution of insurance. Mr. Pool, the named but unsued co-conspirator, is a "district manager" for the Respondent companies. As such, he is an independent contractor in the distribution chain of Respondents' insurance products who has as his major responsibility the recruitment and training of the independent sales agents. Opportunity arose for Mr. Plueckhahn to work for Mr. Pool as Pool's assistant in recruiting and training insurance salesmen. They entered into an employment contract advantageous to Mr. Plueckhahn and desired by Mr. Pool. Respondents did not want their management personnel to be able to work for their independent contractors and asked Mr. Pool to break his contract with Mr. Plueckhahn, which Mr. Pool testified he did because, "I valued my relationship with Farmers Insurance Group." (R. Vol. 6, p. 351, App. 29A.) This action by Respondents was pursuant to a written policy.

The two inaccuracies in the background statement by the Court of Appeals are: (1) The statement that Plueckhahn was employed by Farmers Group, Inc., on June 12, 1962. Plueckhahn was employed by the Farmers Group Companies on that date, but as the record shows,

Farmers Group, Inc. was not organized until 1970. It was organized to bring about efficient management of the companies and to eliminate competition among them and it would clearly be a combination in violation of section 1 of the Sherman Act but for the exemption of the "business of insurance" from the anti-trust laws by the McCarran-Ferguson Act, 15 U.S.C. §1013, which the district court has held does not protect the conduct challenged here (Conclusion of Law No. 2, App. 26A). (2) The statement that Farmers Group, Inc. gave permission for Plueckhahn to work for Pool. While this should be immaterial since the "permission" occurred after the damage was done, this statement is wrong. After having gotten Pool to breach the employment contract between himself and Plueckhahn, Farmers withdrew their request to Pool. The record clearly shows this was not an approval of the employment and Farmers had already worked its collective will.

The basis of federal jurisdiction in the first instance is 28 U.S.C. §1337, and 15 U.S.C. §§ 15 and 22, because the action arose under section 1 of the Sherman Act (15 U.S.C. §1). The district court also had diversity jurisdiction under 28 U.S.C. §1332(1).

ARGUMENT FOR ALLOWANCE OF THE WRIT

Certiorari should be granted because this case presents important issues under the anti-trust laws concerning what an individual must show to prevail in an anti-trust action. Petitioners right to a free market for his labor was interfered with by the Respondents and the holdings of the lower courts are in conflict with *Anderson* v. *Shipowners Association*, 272 U.S. 359 (1926) and *Radovich* v. *National Football League*, 352 U.S. 445 (1957).

The district court found no violation of section 1 of the Sherman Act for these reasons:

1. The entities involved, the Defendants, form a common enterprise.

2. These entities are not in competition with each other.

3. There is not any competitive effect on any party, outside the common enterprise.

Conclusion of Law, No. 5 (App. 26A).

The common enterprise, no competition, no competitive effect outside the common enterprise, approach, used by the district court and adopted by the Court of Appeals looks to the wrong market. Both lower courts failed to judge Petitioners case in terms of the market Petitioner is in and in which he has been injured. That is, the market for Petitioner's services ancillary to the market for insurance policies, and not the market for insurance policies. Anderson and Radovich have not been mentioned by the courts below. Both these cases make it clear that the services market in which the individual is involved is what must be considered. The effect on the larger market to which the services market is ancillary is not controlling. In Anderson, the services market was ancillary to the interstate and foreign shipment of goods. In Radovich, the football player's services market was ancillary to the interstate broadcasting of football games. Here the managerial services market for trainers of insurance agents is ancillary to the marketing of insurance policies. The principles are the same. Indeed, in Radovich, this Court pointed out that the dis-

trict court, affirmed by the Court of Appeals, had dismissed Radovich's claim because, "Radovich had not grounded his claim on conduct of Respondents which was 'calculated to prejudice the public or unreasonably restrain interstate commerce'." 352 U.S. at 447.

Contrary to the conclusion of the district court referred to above and embraced by the Court of Appeals[1] a showing of public injury is not an essential element of a section 1 Sherman Act case. These lower court holdings are contrary to clear teachings of this Court that, "We have held that the right of recovery of a plaintiff in a treble damage anti-trust case does not depend at all on proving an economic injury to the public." *Re McConnell,* 370 U.S. 230, 231 (1962). To show a violation of the Sherman Act and that Petitioner was damaged thereby is all that is necessary. *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U.S. 656, 660 (1961). Petitioner has done this, and to impose more requirements upon an individual creates an economic barrier that effectively denies a person of average means the protection Congress intended the anti-trust laws to provide. The statute, 15 U.S.C. §15, says,

> Any person . . . injured . . . by anything forbidden . . . may sue . . . and shall recover . . .

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[1] Plueckhahn argues only that the policy interfered with interstate commerce and that the policy applies to more employees than himself. This is insufficient to show the substantial adverse market effect necessary under rule of reason analysis.

Court of Appeals Opinion (App. 12A)

Petitioner has been restrained from selling his services. If the market for the services of Petitioner and those similarly affected is looked to, rather than the interstate insurance market, the opinion and judgments below are totally wrong. If the services market is looked to, Pool and the Respondents are in horizontal competition for the services of Petitioner. And what the Respondents have done among themselves, through their agent, Farmers Group, Inc., as well as in combination with Pool, is clearly a boycott to enforce Respondents' written policy designed to keep Pool, and others in his position, out of competition for the services of Petitioner and those in similar positions. As this Court has stated,

> The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531, 541 (1978). Petitioner is the target, Pool was the one pressured, and the Respondents were the ones enlisting Pool to withhold patronage from Petitioner (the target). When the services market is looked to a classic boycott is seen. This restraint on a person's basic right to a free market for his labor should be condemned as a per se violation of section 1 of the Sherman Act.

The Court of Appeals showed some awareness of this Court's holding in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) that in order to pass scrutiny under a "rule of reason" analysis a restraint must be justified by its pro-competitive effect, but the lower court has not given full measure to this

Court's plain caution that, "the inquiry is confined to a consideration of impact on competitive conditions." 435 U.S. at 690. The sole justification for the restraint found by the district court is reflected in Findings of Fact 21 and 22[2] (App. 24A) and was in effect that the policy served legitimate business purposes by preventing improprieties or the appearance of impropriety.

There is no finding of any pro-competitive effect; moreover, no evidence exists showing any pro-competitive effect. In an attempt to satisfy the test of National Society of Professional Engineers, the Court of Appeals concludes that the Respondents stated justification for the restraint (as found by the district court) is sufficient to satisfy the requirement of a showing of pro-competitive effect. The Court of Appeals does not say what market is benefited by the restraint. It is nowhere explained how the elimination of the possibil-

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[2] 21. The policy in question is reasonable and serves legitimate business purposes. The policy is reasonably limited in time and geographical scope.

22. The policy is designed and functions to prevent the appearance of impropriety as well as actual impropriety. The policy addresses the potential for manipulation that could occur both before and after an employee leaves the regional office to work for a district manager. It prevents a situation where prior to leaving the regional office, an employee could obtain or attempt to obtain (or be perceived as obtaining) a wide variety of special favors for a district manager for whom the employee might then go to work. After leaving the regional office, the employee might exercise his influence on behalf of the district manager by using "inside knowledge" or by calling upon personal friendships with persons still in the regional office.

ity of favoritism might enhance competition anywhere. Nor is there any showing the restraint was necessary because other things, such as meeting the market price for the services, would not accomplish the Respondents stated purposes.

The justification for the restraint seems not nearly so compelling as that urged in National Society of Professional Engineers that a restraint on price competition "inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior." 435 U.S. at 693–694, yet, "this Court has never accepted such an argument." 435 U.S. at 694.

What the restraint most assuredly is designed to do, and what it did here, was eliminate competition for Petitioner's services. Pool wanted to employ Petitioner. Petitioner wanted to be employed by Pool. Respondents asked Pool not to hire Petitioner because they had too much invested in him (This is the reason the evidence shows, R. Vol. 6, p. 342, App. 31A). Pool could not understand why Respondents could hire his agents but he could not hire Respondents' employee (R. Vol. 6, p. 342, App. 30A). The obvious answer readily suggests itself. Difference in economic power. Pool's self interest was served by agreeing to Respondents' demand.

The Court of Appeals (Opinion, App. 9A) also errs in holding there could be no per se analysis absent horizontal competition; for,

> As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other.

St. Paul Fire & Marine Ins. Co. v. *Barry,* 438 U.S. 531 at 543 (1978). Thus, whether the matter be viewed for its effect on Petitioner as ultimate target; or as Petitioner being affected by the restraint placed on Pool, competitor with Respondents in the labor market; or as Respondents being in competition with neither Pool nor Petitioner, makes any difference. There was combined effort to restrain Petitioner, and Pool, and Petitioner was injured thereby.

The Court of Appeals also errs in holding that if there is unity of purpose between those engaged in the restraint, that (the unity of purpose) forecloses the actual competition necessary to command per se analysis.[3]

This is a frontal assault on the anti-trust laws for it is but another way of saying that those who have unity of purpose in combining to suppress competition are immune from per se analysis. The Court of Appeals does not explain what unity of purpose it has in mind. The only unity of purpose between Pool and Respondents is in the profitable sale of insurance policies. There was no unity of purpose in the services market. Pool's purpose there was to hire Petitioner and Respondents' purpose was to prevent Pool's hiring Petitioner.

What the Court of Appeals has done is write an exception to the anti-trust laws.

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[3] The defendant companies and Pool shared a unity of purpose that forecloses the actual competition necessary to command the per se analysis in this context.

Opinion (App. 9A)

> In the instant case, the conflict of interest policy was found reasonable by the district court. It was enforced by an employer and one of its closely-allied independent contractors. Enforcement of the policy has no apparent effect on the labor market for insurance employees outside the Farmers Insurance Group system.

Opinion (App. 10A). In other words, if the conspirators are related by common business purpose and the restraint operates only in a labor market within the common business purpose, persons in that labor market have less rights under the anti-trust laws than if the restraint were of more general application. Whatever reasonableness this might have fades quickly if it is realized that restraints similar to the one here, and in Anderson, and in Radovich, will always operate in the market shared by the conspirators and none other. What this really boils down to is a question of whether the matter is in interstate commerce (which neither lower court has questioned)[4] or whether there is public injury, a matter already addressed.

The Court of Appeals has embraced defenses that will effectively bar an individual from being able to pursue the rights granted him by Congress under the anti-trust laws. The Court has rarely had the opportunity to provide direction for the enforcement of the anti-trust laws in the labor services market, probably because of the heavy economic burden the individual laborer must shoulder. It is extremely important not only that Petitioner recover for his injury here, but that the Court of

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[4] *Cf., U.S.* v. *Int'l Boxing Club,* 348 U.S. 236, 241 (1955).

Appeals reasoning not be allowed to stand as a barrier to others in positions similar to Petitioner. In speaking of the attempt to monopolize addressed in *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 213 (1959) this Court said,

> As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.

Petitioner is one small businessman who has only his labor to market and his destruction makes little difference to the economy, but here, as in Klor's the conspirators,

> . . . can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

359 U.S. at 213.

This highest court of last resort is most respectfully prayed to allow the writ and permit briefing, argument, and on the merits consideration of this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 83-1787

Floyd H. PLUECKHAHN,
Plaintiff-Appellant,
v.
FARMERS INSURANCE EXCHANGE,
et al., Defendants-Appellees.
United States Court of Appeals,
Fifth Circuit.

Jan. 2, 1985.

Appeal from the United States District Court for the Western District of Texas.

Before GARZA, REAVLEY, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiff Floyd Plueckhahn contends that an employment policy of Farmers Group, Inc. prohibiting certain employees from working for Farmers Group, Inc. district managers violates § 1 of the Sherman Antitrust Act. The district court, after a bench trial in which the parties submitted detailed Proposed Findings of Fact and Conclusions of Law, held for the defendants. This Court affirms the district court's decision.

I. BACKGROUND

Defendants (Farmers Insurance Exchange, Farmers New World Life Insurance Co., Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century

Insurance Co., and Farmers Group, Inc.) are members of the Farmers Insurance Group. The "Farmers Insurance Group" is not itself a legal entity but instead is a name for the group of affiliated insurance companies (the defendants other than Farmers Group, Inc.) which are managed by Farmers Group, Inc. Defendants collectively refer to themselves as the Farmers Insurance Group, selling a variety of types of insurance coverage to the public.[1] Defendants, with the exception of the central management organization of Farmers Group, Inc., are insurance companies engaged in the business of selling insurance. The companies under the central management organization do not compete with one another; nor do they compete with Farmers Group, Inc., the central management organization. In the geographic areas in which they do business, each (with the exception of Farmers Group, Inc.) writes property, casualty, or life insurance which generally is not written by the other.[2] Defendant Farmers Group, Inc. is the management company for the defendants and is an insurance holding company. Functioning as a management company, Farmers Group, Inc. is responsible for the development of an

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[1] The group system of operation of Farmers Insurance Group is not uncommon in the insurance industry. Farmers Insurance Group and other groups, such as Allstate and State Farm, constitute a substantial portion of the American insurance industry.

[2] Defendant Farmers Insurance Exchange writes auto insurance; defendant Mid-Century Insurance Co. writes preferred risk automobile insurance; defendant Fire Insurance Exchange insures residences against fire and loss; defendant Truck Insurance Exchange insures against certain commercial losses; and defendant Farmers New World Life Insurance Co. writes life insurance.

agency force and for the sale of insurance coverage within the other five affiliated defendant insurance companies. Farmers Group, Inc. fulfills these responsibilities by means of ten regional offices. Texas is one of those regions, and Austin is the regional office headquarters for Texas.

Plaintiff Floyd Plueckhahn was employed by the Texas regional office of Farmers Group, Inc. on June 12, 1962, and initially he worked on the claims staff of that office. In 1970, he became a Division Agency Manager for the Regional Sales Staff. The sales branch of the regional office is responsible for the marketing of the insurance products of its affiliated companies.[3] After Plueckhahn's promotion to one of the five Division Agency Manager positions, his duty was to supervise the District Managers. The District Managers work under an appointment contract. The District Managers consider themselves to be independent businessmen and may have other relationships with insurance companies outside the Farmers Insurance Group system. Although a District Manager does not sell policies himself, he is paid an override on each policy sold by agents under his super-

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[3] In supervising the marketing of these insurance products, Farmers Group, Inc.'s hierarchy includes a Regional Sales Manager, a Regional Agency Manager, and five Division Agency Managers. The Regional Sales Manager heads the sales branch and reports to the Regional Manager. The Regional Agency Manager (who is below the Regional Sales Manager) is in charge of Farmers Group, Inc.'s agents (who sell the policies of the affiliated companies to customers) and has overall responsibility for the recruitment and training of sales agents. Below the Regional Agency Managers are the five Division Agency Managers, who supervise the District Managers of the sales force.

vision. The Divisional Agency Managers and Regional Agency Manager have extensive review duties over the District Managers.[4]

On January 1, 1978, Plueckhahn was promoted from Division Agency Manager to Regional Agency Manager for the sales staff in the Farmers Group, Inc. office in Austin. Approximately four months later, in April 1978, plaintiff Plueckhahn approached Mr. Oscar Pool, a District Manager of Farmers Group, Inc. in Dallas, Texas, and began negotiating with Mr. Pool to secure employment. Plueckhahn's decision to attempt to work for District Manager Oscar Pool conflicted with a longstanding policy of Farmers Group, Inc. regarding employment by Farmers' District Managers of cer-

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[4] The District Managers' specific responsibilities for Farmers Group, Inc. include locating persons interested in becoming insurance agents, assisting them to obtain approval from the Farmers Group, Inc. regional office, and (if the agents are approved) training, supervising, and motivating them. The actual approval of the agents is a function of the regional sales staff. In addition, the Regional Agency Manager and a Divisional Agency Manager are responsible for establishing new agency districts, splitting and combining old districts, training District Managers, assisting them in their duties, and reviewing the results obtained by District Managers.

tain Farmers Group, Inc. employees.[5] The policy's stated aim was to insure against favoritism by preventing employees in the supervisory regional office from going to work for persons they had previously supervised. Despite this conflict of interest provision, Plueckhahn signed an agreement with Pool on May 26, 1978. That agreement provided that Plueckhahn would begin working for Oscar Pool on July 15, 1978.

Plueckhahn continued to work for Farmers Group, Inc. without telling any of his superiors that he had signed an agreement with Pool. On June 15, 1978, Plueckhahn gave oral notice to Jack Lewis, his immedi-

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[5] The pertinent portions of Farmers Group, Inc. policy provided as follows:

"D. *Transfer of Employees Between Departments or Offices*

b. *As Agent*—Salaried personnel may be considered for appointment as an Agent subject to approval of the Regional Manager or Functional Officer and the Vice President - Field Operations under the following conditions:

(1) Conditions set forth on page 13, Section II of the Personnel Policy and Procedure Manual must be met.

(2) Regional Staff members, members of the Regional Sales Manager's Staff, Division Agency Managers, Commercial and Life Sales Representatives, and Sales Trainees are not eligible for appointment as an Agent within their own Region or any other Region they have worked in during the past three years.

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Note: These rules were established to avoid any possible implication of manipulation or favoritism. Rarely will an exception be made.

ate supervisor and the Regional Sales Manager of Farmers Group, Inc., that he was resigning effective July 15, 1978, and was moving to Dallas to work for Pool. Based upon the Farmers Group, Inc. policy against transfers, its supervisors made a request to Pool on June 20, 1978, that Pool not hire Plueckhahn. Thereafter, on June 29, 1978, this request was withdrawn by those supervisors. Farmers Group, Inc. then gave permission for Plueckhahn to work for Pool. Between June 20 and June 29, 1978, Pool chose not to hire Plueckhahn and

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In such rare instances, the Regional Manager will submit a well-documented recommendation to the Vice President - Field Operations for final approval.

c. *In Any Other Employee or Non-Employee Capacity*

Our policy towards employees who leave us to become Office Managers, Training Specialists, etc., for District Managers parallels the guidelines set forth under appointment as an Agent.

In addition to the conditions under Agency appointment, employees seeking such positions should be advised that the Company does not consider these positions to be stepping stones to District Manager appointments. Our policy has generally been to appoint District Managers from amongst our more successful agents. Therefore, an employee must first become a successful agent before he will be considered for appointment to District Manager."

Thus, under this policy, Plueckhahn, as a member of the Regional Sales Manager's Staff, was not eligible to go to work for a District Manager in the Texas region for three years.

settled his employment contract with him.[6] Plueckhahn later settled with Pool as to any claims he might have had under the employment contract. Less than a year later, Plueckhahn secured employment with another District Manager in the Farmers Group, Inc. system.

II. RULE OF REASON ANALYSIS

Plueckhahn presented to the district court and argues here, that the Farmers Group, Inc. policy violates section 1 of the Sherman Act. 15 U.S.C. § 1. He relies on two theories. The first argues that the defendant companies entered into an illegal combination or conspiracy for the purpose of restraining their employees from employment with District Managers and restraining District Managers from employing Farmers Group, Inc. employees. The second theory is that District Manager Pool and the defendant companies formed an illegal combination or conspiracy to enforce the illegal

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[6] The record is not entirely clear as to how much the withdrawn request influenced Pool in his decision making. Some evidence in the record indicates that Pool's primary motivation was to maintain his good relations with the Farmers Insurance Group system and that he therefore acquiesced in the earlier request even though it had been formally withdrawn. Other evidence indicates that Plueckhahn's (sic) decision was based on information that he had received in the interim that Plueckhahn's family problems would unduly interfere with his job performance. The district court made no specific finding of fact on this issue, and, as we explain below, *see infra* slip op. at 1473-1475 [App. 7A-12A] at —, the judgment of the district court must be affirmed, even assuming that Pool acquiesced to the Farmers Group, Inc. request and formed a conspiracy with the defendant companies.

restraint. Plueckhahn characterizes the restraint to be a horizontal boycott and argues that this Court should imply both an anticompetitive purpose and effect through the per se standard.

This Court must reject Plueckhahn's contentions. The district court did not err in reviewing the alleged restraint under the "rule of reason" standard (rather than the per se standard) and in concluding that any restraint here was reasonable. Hence, even assuming that the defendant companies formed a combination or conspiracy under section 1 of the Sherman Act, the alleged restraint in issue evinces no violation of the antitrust laws.[7]

A. *Per se* Illegality

Plueckhahn contends that the alleged restraint is per se illegal. Horizontal combinations requiring a per se analysis are those "agreements among *actual competitors*

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[7] Defendants argue vigorously that no section 1 violation could occur since the defendant companies constituted a common enterprise incapable of conspiring with itself. *See Copperweld Corp. v. Independence Tube Corp.*, — U.S. —, *104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). The instant case presents a different question from Copperweld* since the instant case does not involve a parent and its wholly-owned subsidiary. *See id.* at 2740. Nor does the instant case involve a situation of identity of ownership of the defendants as did a recent case by this Court, *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984). Thus *Copperweld* is not directly on point. However, as we note below, its analysis of unity of purpose is useful in determining whether the district court erred in applying a rule of reason analysis to the alleged restraint.

which restrain competition at the same level of distribution." *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984) (emphasis added). In the instant case, the defendant companies competed neither in the selling of insurance nor in the purchasing of Plueckhahn's services. Thus, the district court did not err in applying a rule of reason analysis (rather than a per se standard) to Plueckhahn's first theory of a horizontal combination among the defendant companies.

Nor did the district court err in applying the rule of reason standard when Plueckhahn's second theory was considered. Under that theory, Plueckhahn argues that there was a horizontal combination or conspiracy to enforce the illegal restraint among the defendant companies and Pool. The defendant companies and Pool shared a unity of purpose that forecloses the actual competition necessary to command the per se analysis in this context. Both the defendant companies and Pool shared the legitimate purpose of marketing the products of the Farmers Insurance Group companies; the alleged restraint here served to eliminate conflicts of interest in pursuing that legitimate purpose. In this context, there can be no per se illegality absent horizontal competition. *See Blackburn v. Crum & Forster,* 611 F.2d 102, 104 (5th Cir.), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2989, 64 L.Ed.2d 856 (1980);[8] *Copperweld, — U.S. at —, 104 S.Ct. at 2742 (fore-*

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[8] Plueckhahn's argument is also foreclosed by the holding in *Blackburn.* There, this Court held that the horizontal component was missing since the alleged target did not compete with the alleged conspirators. The situation here is identical; plaintiff Plueckhahn, the target of the alleged boycott, did not compete with the defendant companies or Pool.

closing section 1 liability entirely since parent and wholly-owned subsidiary, by necessity, have complete unity of interest); Hood, 739 F.2d at 1015 (same).

Moreover, applying the per se rule to the policy here would be destructive of the purpose of both the per se rule and the antitrust laws. This case does not present the classic case of a boycott in which a group of business competitors seeks to benefit economically by excluding other competitors from the market place. *See E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178, 186–87 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973). In the instant case, the conflict of interest policy was found reasonable by the district court. It was enforced by an employer and one of its closely-allied independent contractors. Enforcement of the policy has no apparent effect on the labor market for insurance employees outside the Farmers Insurance Group system. Given these circumstances, this case does not fit the classic boycott situation in which the Court may presume (through the per se analysis) that the conduct is a "naked restraint of trade with no purpose except stifling of competition" and in which this Court therefore would conclusively presume the restraint to be unreasonable. *See White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). *See generally* ABA Section of Antitrust Law, *Antitrust Law Developments (Second)* 40–49 (1984).

Consequently, the per se analysis does not apply. The rule of reason standard governs.

B. Rule of Reason Analysis

Under the rule of reason standard, "the factfinder weighs all of the circumstances of a case in deciding

whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). In determining whether a policy is reasonable, a court may examine such factors as whether the policy serves legitimate business purposes that strengthen competition, whether the policy is drawn narrowly to meet those purposes, and whether the alleged restraint has a substantial adverse effect in the relevant market. *See National Society of Professional Engineers v. United States,* 435 U.S. 679, 691-92 & n. 17, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); *Chicago Board of Trade v. United States,* 246 U.S. 231, 38 S.Ct. 242, 243-44, 62 L.Ed. 683 (1918).

Farmers Group, Inc.'s policy promotes legitimate business concerns that have procompetitive effects. As the trial court found, the Farmers Group, Inc.'s policy does so by preventing both "the appearance of impropriety [and] . . . actual impropriety." Amended Findings of Fact & Conclusions of Law No. 22. The reasoning behind this is to prevent conflicts of interest. Since employees in the regional office have extensive supervisory duties over District Managers in such areas as establishing and determining the boundaries of districts, approving agency applications for District Managers, determining quotas and targets for District Managers, and reviewing and evaluating District Managers, it is necessary that these decisions be made on sound business judgment rather than on an effort by a regional employee to "feather his own bed" by favoring a District Manager for whom he may wish to work.

Further, the policy in issue was drawn narrowly to meet this business interest. It aplies to only 200 of the total 11,600 Farmers Group, Inc. employees. The policy

allowed the affected employee to work for any District Manager outside of the Texas region. It also allowed the affected employee to work for a District Manager in Texas three years after his regional employment had terminated.

Finally, Plueckhahn fails to demonstrate how the policy had a substantial adverse effect on the labor market for insurance company employees. Plueckhahn argues only that the policy interfered with interstate commerce and that the policy applies to more employees than himself. This is insufficient to show the substantial adverse market effect necessary under a rule of reason analysis. The defendant companies' share in purchasing employee services and the availability of other types of work for insurance employees is not demonstrated in the record. All in all, the procompetitive effects clearly outweigh the hypothetical anticompetitive effects.[9]

This Court finds that the district court did not err in holding that the conflict of interest provision here to be not unreasonable (sic).

III. CONCLUSION

For the foregoing reasons the judgment of the district court is

AFFIRMED.

---

[9] Plueckhahn attempts to beg the question of market definition and market share by stating that the relevant market "is the market for the labor services of those employed by the Farmers Group." Plaintiff Appellant's Brief at 8. Plueckhahn offers no support for this market definition. Even taking a charitable view toward Plueckhahn's position, the narrowest market would be that for the labor services of insurance employees.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 83-1787

D.C. Docket No. A-79-CA-176

FLOYD H. PLUECKHAHN,

Plaintiff-Appellant,

versus

FARMERS INSURANCE EXCHANGE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the

Western District of Texas

Before GARZA, REAVLEY and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 2, 1985

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CURCUIT

U.S. COURT OF APPEALS
RECEIVED
JAN 30 1985
NEW ORLEANS, LA.

No. 83-1787

U.S. COURT OF APPEALS
FILED
JAN 30 1985
GILBERT F. GANUCHEAU
CLERK

FLOYD H. PLUECKHAHN,
Plaintiff-Appellant

versus

FARMERS INSURANCE EXCHANGE,
ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(January 30, 1985)

Before GARZA, REAVLEY, and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/SAM JOHNSON

United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
OCT 4 4:08 PM '83
CHARLES W. VAGNER, Clerk
By /s/ B W DEPUTY

FLOYD H. PLUECKHAHN
VS.
FARMERS NEW WORLD LIFE INSURANCE CO., TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE CO., AND FARMERS GROUP, INC.

CIVIL ACTION NO.
A-79-CA-176

JUDGMENT

This action came on for trial before the Court, Honorable James R. Nowlin presiding. The issues having been duly tried and briefed, Findings of Fact and Conclusions of Law entered contemporaneously, and a decision having been duly rendered.

It is ORDERED that the Plaintiff, Floyd H. Plueckhahn, take nothing and that the action be dismissed on the merits and that each party shall bear their own cost.

It is so ORDERED.

SIGNED and ENTERED this 4th day of October, 1983.

/s/JAMES R. NOWLIN
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
SEP 29 1983
CHARLES W. VAGNER, Clerk
By Deputy

FLOYD H. PLUECKHAHN

V. CIVIL ACTION NO.
A-79-CA-176

FARMERS NEW WORLD LIFE INSURANCE CO., TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE CO., AND FARMERS GROUP, INC.

FINDINGS OF FACT

1. Plaintiff is a citizen of the State of Texas with his residence in the Western District of Texas.

2. Defendants are all either corporations or reciprocal insurance companies organized or chartered outside the State of Texas and having their principal place of business outside the State of Texas.

3. The regional office of the Defendant Companies is in Austin, Texas in the Western District of Texas.

4. Defendants, with the exception of Farmers Group, Inc., are insurance companies engaged in the business of selling insurance to the public.

5. In the jurisdictions in which they do business, each such Defendant writes property, casualty and life insurance which generally is not written by any other Defendant.

6. In Texas, Defendant Mid-Century Insurance Co. writes preferred risk automobile insurance; Defendant Fire Insurance Exchange insures residences against fire and loss; Defendant Truck Insurance Exchange insures against certain commercial losses; and Defendant Farmers New World Life Insurance Company writes life insurance.

7. No two Defendants are engaged in competition with each other in the same or similar insurance coverage (Tr. 313, 358-59, 429-30).

8. The amount in controversy in this suit is in excess of $10,000.00.

9. Defendants are engaged in interstate commerce.

10. Defendant Farmers Group, Inc. is a management company for the other Defendants and is an insurance holding company (Tr. 429). Functioning as a management company, Farmers Group, Inc. is responsible for the development of an agency force and for the sales of insurance coverage. It fulfills these responsibilities by means of ten regional offices. Texas is one of those regions, and Austin is the regional office headquarters for Texas. Farmers Group, Inc. and the other Defendants are together known and advertised as the Farmers Insurance Group (FIG).

(Hereinafter, this group will be referred to as "FIG" or "Farmers.").

11. The group system of operation of FIG is common in the insurance industry. FIG and other groups, such as Allstate and State Farm, constitute a substan-

tial proportion of the American insurance industry (Tr. 431-32). The public benefits from the group system of operation in that consumers can purchase multiple types of insurance through one agent and benefit from centralized claims handling and administrative efficiencies (Tr. 430-31).

12. The Texas regional office of Farmers Group, Inc. is headed by a regional manager, who presides over, among other things, a sales branch of the office. The sales branch of the office (sometimes referred to as the "Regional Sales Manager's Staff"), is responsible for the marketing of the insurance products of the Farmers Insurance Group companies mentioned above. Such responsibility includes the recruitment, training and supervision of the agency force licensed by such companies. This division or branch of the regional office is headed by a regional sales manager who reports directly to the regional manager. Included on the Regional Sales Manager's Staff are the regional agency manager (R.A.M.), who has overall responsibility for the recruitment and training of an agency force, and five division agency managers (D.A.M.s), whose responsibility is to supervise the district managers in their respective divisions.

13. The district managers (D.M.s) of Farmers work under an appointment contract. It is their responsibility to recruit and train potential agents. Although the word 'district' usually denotes a geographical limitation, the district managers are free to recruit agents wherever they wish. The district manager's specific responsibilities are to locate people interested in becoming Farmers insurance agents, to assist them in obtaining approval and licensing, and if those persons are approved by Farmers

and licensed by the State regulatory agency, to train, supervise, and motivate them. The actual approval of such persons as Farmers' agents is a function of the Farmers Group, Inc. regional sales staff. The district manager does not actually sell insurance policies himself, nor is he personally involved in the reporting or collection of premiums (Tr. 314). The district managers are paid by an overwrite on each policy sold by an agent under their supervision. The district managers function as a key link in the sales management chain of Farmers Group, Inc. (Tr. 252).

14. Plaintiff Floyd Plueckhahn was employed by the Texas regional office of Defendants on June 12, 1962. Initially he worked on the claims staff in such office. In 1970 he became a member of the regional sales staff as a Division Agency Manager (Tr. 33). On January 1, 1978 Plueckhahn became Regional Agency Manager (R.A.M.) for Defendant Farmers Group, Inc. in Texas.

15. Approximately four months later, in April, 1978, Plaintiff Plueckhahn, without giving any verbal or written notice to his employer, approached Mr. Oscar Pool, a district manager of Defendants in Dallas, Texas, and began negotiating with Oscar Pool to secure employment.

16. Floyd Plueckhahn's decision to attempt to work for District Manager Oscar Pool conflicted with a long-standing policy of Farmers Group, Inc. regarding the employment by Farmers' district managers of certain Farmers' employees.

17. Following his secret negotiations with Oscar Pool, Floyd Plueckhahn signed an agreement with Oscar

Pool on May 26, 1978, again without telling any of his superiors that he was doing so. That agreement provided that Plueckhahn would begin working for Oscar Pool on July 15, 1978.

18. Plueckhahn continued to work for Farmers without telling any of his superiors that he had signed an agreement with Oscar Pool. Although the written agreement between Plueckhahn and Pool provided that Plueckhahn would give notice of his resignation to Farmers on June 9, 1978, he did not do so until June 15, 1978, at which time Plueckhahn gave oral notice to Jack Lewis, Regional Sales Manager of Farmers, that he was resigning, effective July 15, 1978, and was moving to Dallas. The Court finds that no one in Farmers Group, Inc., knew of the existence of the Pool/Plueckhahn agreement or contract before June 15, 1978 when Plueckhahn first mentioned the agreement to MacKinnon.

19. The pertinent portions of Farmers Group, Inc. policy provided as follows:

> "D. *Transfer of Employees between Departments or Offices*
>
> b. *As Agent* — Salaried personnel may be considered for appointment as an Agent subject to approval of the Regional Manager or Functional Officer and the Vice President - Field Operations under the following conditions:
>
> (1) Conditions set forth on page 13, Section II of the Personnel Policy and Procedure Manual must be met.

(2) Regional Staff members, members of the Regional Sales Manager's Staff, Division Agency Managers, Commercial Life Sales Representatives, and Sales Trainees are not eligible for appointment as an Agent within their own Region or any other Region they have worked in during the past three years.

★ ★ ★

Note: These rules were established to avoid any possible implication of manipulation or favoritisim. Rarely will an exception be made.

In such rare instances, the Regional Manager will submit a well-documented recommendation to the Vice President - Field Operations for final approval.

c. *In any Other Employee or Non - Employee Capacity*

Our policy towards employees who leave us to become Office Managers, Training Specialists, etc., for District Managers parallels the guidelines set forth under appointment as an Agent.

In addition to the conditions under Agency appointment, employees seeking such positions should be advised that the Company does not consider

> these positions to be stepping stones to District Manager appointments. Our policy has generally been to appoint District Managers from among our more successful agents. Therefore, an employee must first become a successful agent before he will be considered for appointment to District Manager (See D-2-a, page V-4)." (Defendants' Exhibit No. AA-2)

Thus, under this policy, Plueckhahn, as a member of the Regional Sales Manager's Staff, was not eligible to go to work for a district manager in the Texas Region for three years.

20. This policy had been in effect for several years prior to the Plueckhahn/Pool contract, the policy as it applied to a person in Mr. Plueckhahn's position—Regional Agency Manager attempting to go to work for a district manager—was unchanged since at least as early as July 1, 1974 and that the same policy was in effect even earlier than that date (Tr. 470).

21. The policy in question is reasonable and serves legitimate business purposes. The policy is reasonably limited in time and geographical scope.

22. The policy is designed and functions to prevent the appearance of impropriety as well as actual impropriety. The policy addresses the potential for manipulation that could occur both before and after an employee leaves the regional office to work for a district manager. It prevents a situation where prior to leaving the regional office, an employee could obtain or attempt to obtain

(or be perceived as obtaining) a wide variety of special favors for a district manager for whom the employee might then go to work. After leaving the regional office, the employee might exercise his influence on behalf of the district manager by using "inside knowledge" or by calling upon personal friendships with persons still in the regional office.

23. Based upon the policy against intercompany transfers Farmers made a request that Oscar Pool not hire Floyd Plueckhahn on June 20, 1978. Thereafter on June 29, 1978 this request was withdrawn by Farmers, and Farmers Group, Inc. then gave permission for Plueckhahn to work for Pool. Between June 20 and June 29, 1978 Oscar Pool chose not to hire Pool and settled his employment contract with Plaintiff.

24. Plueckhahn was informed that he could be hired in the Dallas area at Farmers Group, Inc. if an opening occurred. Plaintiff made no significant attempt to obtain such employment. Farmers Group, Inc. did not refuse to rehire Plaintiff, but after Plaintiff had voluntarily resigned on June 20, 1978, the regional staff took reasonable steps to find a replacement.

25. On July 21, 1978, Plueckhahn received $6,000 from Oscar Pool. That amount was "in settlement of [the] termination provisions" of the contract. Pool gave to Plueckhahn and Plueckhahn returned his original executed copy of the contract to Pool after writing on the contract "Agreement complied with. Received Settlement of $6,000 on 7-21-78" (Tr. 104-05, 111). The $6,000 check stated on its face "Employment Contract Paid in Full", (Defendants' Exhibit No. B). Plueckhahn listed the $6,000 on his 1978 tax return as having been received as income in 1978 (Tr. 105-06).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this suit under 28 U.S.C., §1337 and under 15 U.S.C., §§ 15 and 22 because the action arises under Section 1 of the Sherman Act (15 U.S.C., §1).

2. The Insurance Exemption § 3 of 15 U.S.C. § 1013(b) does not apply to the facts at bar. *Group Life & Health Insurance Company* v. *Royal Drug Company,* 440 U.S. 205, 99 S.Ct. 1067 (1978); *American Family Life Assurance* v. *Planned Marketing Association,* 389 F.Supp. 1141 (E.D. Va. 1974).

3. This Court has jurisdiction of this suit under 28 U.S.C., § 1332(1) by virtue of diversity of citizenship and amount in controversy exceeds the sum or value of $10,000.00.

4. This Court also has jurisdiction of Count Two of the Complaint under its pendent jurisdiction because of the substantiality of the Federal claim presented by Count One.

5. The Court finds no violation of § 1 of the Sherman Act for the following reasons:

1. The entities involved, the Defendants, form a common enterprise.

2. These entities are not in competition with each other.

3. There is not any competitive effect on any party, outside the common enterprise.

See, Thomsen v. *Western Electric Co., Inc.,* 680 F.2d 1263 (1982).

6. There is not a showing of public injury, which is an essential element of a cause of action under Section 1 of the Sherman Act. *See Kestenbaum* v. *Falstaff Brewing Corp.,* 514 F.2d 690 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); *Kinnear-Weed Corp.* v. *Humble Oil Refining Co.,* 214 F.2d 891 (5th Cir. 1954), *cert. denied,* 348 U.S. 912 (1955). Plaintiff, did not allege or prove facts authorizing a finding that the Defendants' conduct was *per se* illegal. *See, e.g., Blackburn* v. *Crum & Forster,* 611 F.2d 102 (5th Cir. 1980), *cert. denied,* 446 U.S. 906 (1980); *Macky* v. *National Football League,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977). The allegations and facts in this case require that the Defendants' conduct be evaluated under the "rule of reason" standard.

7. There is insufficient proof to establish a cause of action for interference with contractual relations. The Court concludes the Pool/Plueckhahn contract was an at-will contract, one which was terminable at the will of the parties, though the exercise of Pool's right to terminate required Pool to pay Plueckhahn a specified sum of money. Under this analysis, Pool's promise to employ Plueckhahn could not have been breached, for he had the right to do so at his will. Under Texas law a party to an at-will contract does not have a claim against one who induces the other party to the contract to terminate the contract. *Davis* v. *Alwac International, Inc.,* 369 S.W.2d 797, 808 (Tex. Civ. App.—Beaumont 1963, writ ref'd n.r.e.); *Kingsberry* v. *Phillips Petroleum Company,* 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.); *Richardson* v. *Terry,* 212 S.W. 523, 525 (Tex. Civ. App.—El Paso 1919).

8. The evidence established justification and privilege for the action of Defendants.

Under Texas law, for liability to attach for tortious interference with contractual relations, the acts taken by the Defendants must have been without right or justification. *Black Lake Pipe Line Co.* v. *Union Construction Co.*, 538 S.W.2d 80, 91 (Tex. 1976). In *Terry* v. *Zachry,* 272 S.W.2d 157 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

SIGNED and ENTERED this 29th day of September, 1983.

/s/James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Q It was an unpleasant affair as far as you were concerned throughout, was it not?

A Not dreadfully unpleasant, no.

Q Not dreadfully unpleasant?

A No.

Q Just a little unpleasant?

A You never do like to have to say no to somebody.

Q And you never do like to have to be in a position possibly of getting crosswise with somebody you are closely associated with either, do you?

A You are correct.

Q As a matter of fact, do you recall what you told me right at first when I first asked you why you agreed to honor their request?

A If I remember correctly I used something of the effect that I valued my relationship with Farmers Insurance Group.

Q Yes, sir.

A And my good relationship, I probably said.

Q And it has been a very good one, hasn't it?

A I count it as so.

Q And a lucrative one for you?

A Better than picking cotton.

Q Yes, sir. Mr. Pool, there has been some testimony at

A I had one question in my mind that I wanted to talk with Mr. MacKinnon about and had to do with the fact that on prior occasions to have an agent they would like to have as district manager, and they did in fact take—I don't know—two or three of my agents as district managers, and I had some concern that if they had the liberty of taking my agents for district managers, why I didn't have the same liberty to take a company employee to assist in my district.

Q That seemed like what is sauce for the goose ought to be sauce for the gander.

A That was my primary reason for wanting to talk to him.

Q Did you discuss that with him?

A Yes, I did. I related that.

Q What was his response to that?

A His response was that, if I remember correctly, he could appreciate my position but in a case like Mr. Plueckhahn with the amount of investment the company had in training and the area of responsibility he had and the knowledge he had of the company's operation, which would be valuable to the company, they would prefer that I not employ him. I was satisfied with their answer, accepted it and agreed to their request.

Q So that the reason that they gave you was simply that

APPENDIX G

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 4 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall

make any contract or engage in any combination or conspiracy declared by section 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.